BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ANTONINO MORA, Claimant, v. PHEASANT RIDGE DEVELOPMENT, INC., Employer, Defendant.	)	**IC 2007-008762** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** filed July 31, 2008

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Pocatello on March 7, 2008. Claimant, Antonino Mora, was represented by Kent Higgins of Pocatello. Defendant Employer, Pheasant Ridge Development, Inc., was represented by Craig Parrish of Pocatello. At hearing the parties presented oral and documentary evidence. No post-hearing depositions were taken. Post-hearing briefs were filed and this matter came under advisement on May 13, 2008. The case is now ready for decision.

ISSUES

The threshold issues to be resolved presently are:

1. Whether Claimant has complied with the notice limitations of Idaho Code §§ 72-701 through 72-706, and whether these limitations are tolled pursuant to Idaho Code § 72-604;
2. Whether Claimant suffered an injury from an accident arising out of and in the

course of employment; and

3. Whether the condition for which Claimant seeks benefits was caused by the industrial accident.

ARGUMENTS OF THE PARTIES

Claimant asserts he suffered an industrial accident on November 6, 2006, resulting in a left inguinal hernia. He maintains he notified his supervisor and a coworker, who also functioned as a supervisor, within 60 days of his accident and is entitled to benefits. Claimant further asserts that Employer was not prejudiced by any delay in notice.

Employer maintains that Claimant's coworker was not a supervisor and that Claimant did not give notice of his industrial accident to his supervisor within 60 days. Defendant denies Claimant is entitled to any benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, his wife Carmela Mora, and Marcie Lyle taken at the March 7, 2008, hearing;

2. Claimant's Exhibits 1 through 7 admitted at the hearing; and

3. Defendant's Exhibit A admitted at the hearing.

After having considered the above evidence, and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Employer is a development company which orchestrated the development of a large number of townhouses in 2005 and 2006. Marcie Lyle was Employer's project manager from at least November 2005 through February 2007.

2. In November 2005, Lyle hired Claimant. Claimant worked for Employer from November 2005 through November 19, 2006. He cleaned up building sites, swept rooms, and took garbage to the dumpsters. Employer did not assign Claimant tasks requiring heavy lifting because of Claimant's prior back condition. Lyle visited the development site approximately daily and gave work assignments to Defendant's employees there.

3. Claimant testified that on November 6, 2006, while cleaning up building sites for Employer, he lifted a large piece of concrete and felt pain in his wrist and stomach. He sought no immediate medical attention. Claimant's accident was not witnessed by any other individual. Claimant was earning $10 per hour at the time.

4. Claimant testified he told another Pheasant Ridge employee, Bruz, of his injury that day and the next day, and repeatedly attempted to notify Lyle between November 6 and 19, 2006, but Lyle was unavailable and never responded to Claimant's phone calls.

5. Claimant's mother became ill and he arranged to travel to Mexico to visit her. To help fund his trip, Claimant requested Employer issue his work check early, including four days of work which would have ordinarily been paid in a later pay period. Employer accommodated Claimant's request and issued Claimant's check early. Lyle testified she spoke with Claimant telephonically several times in approving and arranging to issue his check early. Documentary evidence tends to confirm, and Claimant did not dispute that he received his work check early. The Referee finds Claimant's testimony that Lyle was unavailable to respond to his phone calls between November 6 and 19, 2006, cannot be accurate. Lyle's testimony that she contacted Claimant telephonically several times between November 6 and 19, 2006, is credible.

6. Employer terminated Claimant's employment on November 19, 2006. Lyle testified Claimant's employment was terminated because he was working for subcontractors in

the Pheasant Ridge development area during hours he was being paid to work for Employer. Claimant testified he never performed jobs for other contractors during the time in question. However, Lyle testified that Claimant cleaned up job sites for other contractors during the summer of 2006. Lyle did not object to Claimant working for other contractors, so long as Claimant did not do so while on the clock for Employer. Lyle specifically testified that Claimant cleaned up sheet rock in one instance and roofing scrap in another instance for other contractors while on Employer's time. The Referee finds Lyle's testimony in this regard credible.

7. Shortly after November 19, 2006, Claimant traveled to Mexico for two weeks. Claimant does not assert, and there is no evidence, that Claimant notified Lyle of his injury before his trip to Mexico even though Claimant spoke to Lyle telephonically several times between November 6 and 19, 2006. The Referee finds that Claimant did not advise Lyle of his accident prior to his trip to Mexico.

8. After returning from his trip, on December 14, 2006, Claimant presented to Richard Wathne, M.D., in Pocatello with left wrist complaints persisting for six weeks. Dr. Wathne's notes record that Claimant had lifted and thrown some concrete six weeks earlier. Dr. Wathne's notes are silent as to whether this occurred at work. Significantly, Dr. Wathne's notes do not mention any abdominal symptoms or hernia.

9. On March 1, 2007, Ty Salness, M.D., diagnosed Claimant with a left inguinal hernia and recommended surgical treatment. As of the time of hearing, Claimant was still awaiting surgery. Claimant's wrist symptoms have apparently resolved.

10. Having observed the witnesses at hearing, evaluated their demeanor, and compared their testimony, the Referee finds Lyle's testimony and Claimant's wife's testimony more credible than Claimant's testimony in several critical instances. Claimant's recollection of

the timing of some events is inaccurate.

DISCUSSION AND FURTHER FINDINGS

11. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). However, the Commission is not required to construe facts liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

12. **Notice.** Idaho Code § 72-701 provides in pertinent part:

> No proceedings under this law shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable but not later than sixty (60) days after the happening thereof, and unless a claim for compensation with respect thereto shall have been made within one (1) year after the date of the accident . . . .

Idaho Code § 72-703 provides in part:

> Any notice under this law shall be given to the employer …. If the employer is a corporation, then the notice may be given to any agent of the corporation upon whom process may be served, or to any officer of the corporation, or any agent in charge of the business at the place where the injury occurred. Such notice shall be given by delivering it or by sending it by registered or certified mail addressed to the employer at his or its last known residence or place of business. The foregoing provisions shall apply to the making of a claim.

Idaho Code § 72-604 provides in relevant part:

> When the employer has knowledge of an occupational disease, injury, or death and willfully fails or refuses to file the report as required by section 72-602(1), Idaho Code, … the limitations prescribed in section 72-701 and section 72-706, Idaho Code, shall not run against the claim of any person seeking compensation until such report or notice shall have been filed.

13. The Idaho Supreme Court has held that the notice must be sufficient to apprise the employer of any accident arising out of and in the course of employment causing the personal injury. Murray-Donahue v. National Car Rental Licensee Association, 127 Idaho 337, 339, 900

P.2d 1348, 1350 (1995).

14. Supervisor or agent. Claimant argues that he gave timely notice of his accident and injury to Bruz and to Lyle, and that both were his supervisors. Defendant acknowledges that Lyle was Claimant's supervisor; but that Bruz had no supervisory role nor authority.

15. In his briefing, Claimant asserts that Bruz was his supervisor. However, at hearing Claimant testified inconsistently on this issue. Claimant testified that he believed Bruz was his supervisor yet he also expressly acknowledged that Bruz was not his boss.

16. The record establishes that Claimant obtained some directions through Bruz regarding Claimant's work assignments from Lyle. Lyle acknowledged that Bruz was often a conduit of information for the day's work assignments; however she made the work assignments and testified there was no intermediate supervisor between Lyle and Claimant. Lyle testified that Bruz was her right hand man in charge of finish work, paint touch ups, and texturing. She testified that Bruz was not Claimant's supervisor; Lyle herself was Claimant's supervisor. Lyle hired Claimant and approved his paychecks. Bruz had no authority to hire, fire, approve paychecks, issue paychecks, or tell other employees what job to do other than their normal routine daily work which Lyle assigned. Bruz was knowledgeable and able to answer employee questions, however Lyle was in charge of the job site even when she was not present. Bruz does not appear to have had authority to direct Claimant's work, but only relay Lyle's directions. When Lyle was recovering from foot surgery in late 2006, Employer briefly designated Matt Hatch to supervise Claimant and the work site rather than authorize Bruz to do so.

17. The Referee finds Lyle's testimony on this issue more credible than Claimant's inconsistent testimony and concludes that Bruz was not Claimant's supervisor, nor was Bruz Employer's agent in charge of its place of business where Claimant's accident allegedly

occurred. Thus notice to Bruz, if any, did not constitute notice to Employer unless Bruz relayed information to Employer's representative thereby providing actual knowledge of Claimant's alleged accident.

18. Actual knowledge. Claimant testified that he told Bruz of his injury the day it occurred and then showed Bruz his bruised left hand the day after it occurred. Claimant also testified that Bruz told Claimant to tell Lyle of his injury. Additionally, Claimant testified he told Bruz of his injury on November 19, 2006. Claimant testified that when he later told Lyle about his injury, Lyle asked Bruz if Claimant had told him about an accident and Bruz said he did not remember any such incident. Lyle testified that Bruz never told her anything about Claimant's injury. There is no evidence that Bruz ever advised Lyle of Claimant's injury. Given Claimant's poor recollection of other dates and circumstances relating to his alleged accident, the Referee finds it questionable whether Claimant informed Bruz of his alleged accident. The Referee finds that Bruz never informed Lyle of Claimant's November 6, 2006, injury.

19. Time of first notice. Employer argues that Claimant failed to give timely notice of his accident as required by Idaho Code § 72-701, and Employer did not have actual or constructive knowledge of the same.

20. Claimant testified inconsistently at hearing about when he first notified Lyle of his injury. Claimant testified that he first notified Lyle of his injury in early December 2006. Later in the hearing, he testified it might have been after Christmas.

21. As noted above, Claimant contacted Lyle at least telephonically between November 6 and 19, 2006, to secure early issuance of his work check to pay for his trip to Mexico. Claimant had clear opportunity to notify Lyle of his injury in November 2006, but did not do so.

22. Claimant testified that after returning from Mexico he talked to Lyle in early December or perhaps after Christmas 2006 at the Pheasant Ridge development site. Claimant testified that his wife was with him at that time. Claimant advised Lyle of his injury. In response to Claimant's questions, Lyle told him that Bruz had not said anything about Claimant's injury. Lyle testified that this conversation with Claimant, his wife, and Bruz occurred in late January or February 2007 and was the first time Lyle heard of Claimant's accident or injuries. Claimant's wife testified that she first saw Claimant talk to Lyle about his injury in late January 2007. The Referee finds that the conversation with Lyle, Claimant, Claimant's wife, and Bruz occurred in late January 2007.

23. During the course of the conversation in late January 2007, Lyle asked Claimant to provide her some information from his doctor. Claimant then went to Dr. Wathne's office and returned with his medical records which he provided to Lyle. This occurred no earlier than late January 2007.

24. Claimant testified that he had a conversation with Lyle in December 2006 about the accident, but Claimant's testimony is inconsistent and his recollection suspect. Claimant's wife testified that Claimant first asserted he told Lyle of his injury in December 2006 when she helped him fill out the Claim form in June 2007. Claimant's memory on other dates is sufficiently inaccurate to persuade the Referee that Claimant's recollection of the date of his first conversation being in December 2006 is not reliable.

25. The Referee finds that Employer had no knowledge of Claimant's November 6, 2006, accident and injury until late January 2007; well beyond 60 days after its occurrence. The limitations prescribed by Idaho Code § 72-701 are not tolled by Idaho Code § 72-604. Claimant first gave notice of his November 6, 2006, accident to Lyle in late January 2007, more than 60

days after the accident. Claimant has failed to prove he gave timely notice of his November 6, 2006, accident and his claim is barred by Idaho Code § 72-701, unless the provisions of Idaho Code § 72-704 apply.

26. **Prejudice**. Having found that Employer did not have knowledge that Claimant suffered an injury until well past the 60 day notice period, Claimant asserts that lack of timely notice does not result in prejudice in this case.

27. Idaho Code § 72-704 provides in pertinent part:

> A notice given under the provisions of section 72-701 or section 72-448, Idaho Code, shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, nature or cause of the injury, or disease, or otherwise, unless it is shown by the employer that he was in fact prejudiced thereby. Want of notice or delay in giving notice shall not be a bar to proceedings under this law if it is shown that the employer, his agent or representative had knowledge of the injury or occupational disease or that the employer has not been prejudiced by such delay or want of notice.

28. The Court in Jackson v. JST Manufacturing, 142 Idaho 836, 136 P.3d 307 (2006), observed that Idaho Code § 72-704 gives the employer a favorable presumption and it is the claimant's burden to affirmatively prove that the employer was not prejudiced by lack of timely notice. The employer's statement that it would not have done anything differently had notice been timely provided does not prove the employer was not prejudiced. In Kennedy v. Evergreen Logging Co., 97 Idaho 270, 272, 543 P.2d 495, 497 (1975), the Court rejected an argument that the employer was not prejudiced by untimely notice because the surety made as complete an investigation of the accident as was possible had notice of the accident and injury been given on the day it occurred and because the treatment the claimant eventually received was the same as it would have been had the surety been given proper notice. In Dick v. Amalgamated Sugar Co., 100 Idaho 742, 744, 605 P.2d 506, 508 (1980), the Court noted that where a claimant contends the medical treatment would have been the same regardless of timeliness of notice, the claimant

has still failed to carry his or her burden.

29. Claimant herein bears the difficult burden to prove a negative—that is, to prove that Employer was not prejudiced by the untimely notice. Had Claimant's accident been timely reported, Employer would have had an opportunity to promptly investigate the claim. Given Claimant's unwitnessed accident and his known work for other contractors in the area, this hampered Defendant's opportunity to investigate the claim to determine its validity. Furthermore, the delay in notice arguably hampered Defendant's ability to provide reasonable medical treatment. Claimant alleges he sustained an inguinal hernia on November 6, 2006, but this condition was not diagnosed until nearly five months later on March 1, 2007. The record suggests Claimant's ability to work may have been compromised during this period, thus exposing Defendant to greater potential liability. The record may not show that Defendant was prejudiced by lack of timely notice; however, the record does not affirmatively show that Defendant was not prejudiced.

30. Claimant has not proven that the bar to his claim arising from Idaho Code §72-701 is averted by satisfaction of Idaho Code § 72-704.

31. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove he gave timely notice of his accident, and his claim is barred pursuant to Idaho Code § 72-701.

2. Claimant has failed to prove that the bar to his claim posed by Idaho Code § 72-701 is averted by Idaho Code § 72-604 or by satisfaction of Idaho Code § 72-704.

3. All other issues are moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusion of Law, the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this _26th __ day of July 2008.

INDUSTRIAL COMMISSION

__/s/_____
Alan Reed Taylor, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ANTONINO MORA, Claimant, v. PHEASANT RIDGE DEVELOPMENT, INC., Employer, Defendant.	)	**IC 2007-008762** **ORDER** filed July 31, 2008

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to prove he gave timely notice of his accident, and his claim is barred pursuant to Idaho Code § 72-701.

2. Claimant has failed to prove that the bar to his claim posed by Idaho Code § 72-701 is averted by Idaho Code § 72-604 or by satisfaction of Idaho Code § 72-704.

3. All other issues are moot.

4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this __31st day of _____July_____, 2008.

INDUSTRIAL COMMISSION

_/s/_____
James F. Kile, Chairman

_/s/_____
R.D. Maynard, Commissioner

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _31st_ day of ___July_____, 2008 a true and correct copy of **Findings, Conclusions, and Order** was served by regular United States Mail upon each of the following:

KENT A HIGGINS
PO BOX 991
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CRAIG W PARRISH
PO BOX 4321
POCATELLO ID 83205

ka ___/s/_____